

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HELENA DIVISION

THOMAS J. PETERSEN,

Petitioner,

vs.

ATTORNEY GENERAL OF THE
STATE OF MONTANA,

Respondents.

Cause No. CV 14-47-H-DLC-RKS

ORDER and FINDINGS AND
RECOMMENDATION OF U.S.
MAGISTRATE JUDGE

On July 25, 2014, Petitioner Thomas Petersen moved to proceed in forma pauperis with this action under 28 U.S.C. § 2254. Mr. Petersen is a state prisoner proceeding pro se.

Mr. Petersen has sufficiently shown he cannot afford to pay all costs that may be associated with this action. The motion to proceed in forma pauperis will be granted.

Mr. Petersen's petition, however, should be dismissed without prejudice. He challenges a conviction as to which a Second Amended Judgment and Commitment was entered in the trial court on February 12, 2014. *See Pet. (Doc. 1) at 3 ¶¶ 3-4; see also Second Am. Judgment (Doc. 1-1) at 10, Petersen v. Att'y Gen'l, No. CV 14-09-H-DLC (D. Mont. filed Feb. 26, 2014).* None of the issues Mr. Petersen presents in his federal petition, *see "Appellate"* (Doc. 1-2 at 1), has

been fairly presented to the courts of the State of Montana. Mr. Petersen may yet file a petition for postconviction relief in the trial court and, if necessary, he may appeal the denial of such a petition to the Montana Supreme Court. Until Mr. Petersen's remedies in state court are exhausted, he may not proceed in this Court. The only proper route forward at this time for Mr. Petersen lies in the state courts.

A certificate of appealability, 28 U.S.C. § 2253(c)(2), is not appropriate. Reasonable jurists would not find any exhausted claim. There is no reason to encourage further proceedings in this Court at this time. *Gonzalez v. Thaler*, ___ U.S. ___, 132 S. Ct. 641, 648 (2012) (quoting *Slack*, 529 U.S. at 484).

Based on the foregoing, the Court enters the following:

ORDER

1. Mr. Petersen's motion to proceed in forma pauperis (Doc. 2) is GRANTED. The Clerk of Court shall waive payment of the filing fee.
2. The Clerk shall include, with Mr. Petersen's service copy of this Order, the Findings and Recommendation entered in his first case, No. CV 14-09-H, on February 27, 2014 (Doc. 4 *in* CV 14-09-H), and the Order adopting the Findings and Recommendation on March 17, 2014 (Doc. 6 *in* CV 14-09-H).

The Court also enters the following:

RECOMMENDATION

1. Mr. Petersen's petition (Doc. 1) should be DISMISSED as unexhausted.
2. The Clerk of Court should be directed to enter, by separate document, a judgment of dismissal.
3. A certificate of appealability should be DENIED.

**NOTICE OF RIGHT TO OBJECT
TO FINDINGS & RECOMMENDATION
AND CONSEQUENCES OF FAILURE TO OBJECT**

Mr. Petersen may object to this Findings and Recommendation within 14 days.¹ 28 U.S.C. § 636(b)(1). Failure to timely file written objections may bar a de novo determination by the district judge and/or waive the right to appeal.

Mr. Petersen must immediately notify the Court of any change in his mailing address by filing a “Notice of Change of Address.” Failure to do so may result in dismissal of this action without notice to him.

DATED this 25th day of August, 2014.

/s/ Keith Strong
Keith Strong
United States Magistrate Judge

¹ As this deadline allows a party to act within 14 days after the Findings and Recommendation is “served,” Fed. R. Civ. P. 6(d) applies, and three days are added after the time would otherwise expire.